THE NAVAJO NATION, ET AL.

IBLA 98-18 Decided April 28, 2000

Appeal from a decision by the New Mexico State Office, Bureau of Land Management, approving coal preference right lease applications. NMNM 8128, etc. 1/

Set aside and remanded.

1. Administrative Procedure: Adjudication--Coal Leases and Permits: Applications

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. The recipient of a BLM decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. Where BLM approves preference right lease applications for coal leases without documenting its reasoned analysis in reaching its conclusions, BLM's decision will be set aside and remanded for further adjudication.

APPEARANCES: Paul E. Frye, Esq., and Joshua S. Grinspoon, Esq., Albuquerque, New Mexico, for the Navajo Nation; Bertha L. Mescal; Brandt Andersson, Esq., Walnut Creek, California, for Thermal Energy Company; Arthur Arguedas, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

The Navajo Nation and Bertha L. Mescal (Appellants) have appealed the July 24, 1997, Record of Decision (ROD) of the New Mexico State Office, Bureau of Land Management (BLM), approving three preference right coal lease applications (PRLA's or applications) filed with BLM by Thermal Energy Company (Thermal Energy or Thermal). 2/ These PRLA's were

1/ The serial numbers are: NMNM 8128, NMNM 8130, and NMNM 11670.
2/ These PRLA's have been linked by Thermal into a combined mining venture (CMV).

previously rejected by BLM and, consequently, were the subject of separate appeals to this Board by Thermal. The history pertinent to those appeals has been set forth in Thermal Energy Co., 135 IBLA 291 (1996) (Thermal I), which addressed NMNM 8128 and NMNM 8130, and Thermal Energy Co., 135 IBLA 325 (1996) (Thermal II), which addressed NMNM 11670. By way of introduction, in Thermal I we observed:

> BLM's decisions state that Thermal "failed to meet the requirements of 43 CFR 3430.5-1(a)(3) and 43 CFR 3430.2-1(a)(2), and has failed to show commercial quantities on the applied for lands as per 43 CFR 3430.5-1(a)(1) * * *; that Thermal "did not provide adequate responses to [several] requested items" in BLM's Intent to Reject Application notices dated June 15, 1989; and that Thermal's revised Final showing "did not demonstrate commercial quantities * * * and did not provide the additional information requested." BLM's decisions conclude:
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> > Therefore, in accordance with 43 CFR 3430.5-1(a)(1), [each application] is hereby rejected for failure to demonstrate that coal exists in commercial quantities on the applied for lands, and for failure to meet the other Final Showing requirements set forth by statute and regulation as specified in our Decision of December 2, 1987, our Notice of June 15, 1989, and in this Decision.

Thermal I, 135 IBLA at 293-94 (footnote omitted). In setting aside BLM's decision in Thermal I, we determined that BLM could not make a commercial quantities determination until it had adequate information upon which it could base such determination. We further stated that it is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. 135 IBLA at 322, citing Eddleman Community Property Trust, 106 IBLA 376, 377 (1989); Roger K. Ogden, 77 IBLA 4, 7, 90 I.D. 481, 483 (1983). In providing BLM guidance in terms of what data to consider and what data to report in its new decision, we stated:

> In this case it is apparent BLM does not have all the information it needs. From BLM's analysis in the record it appears that information includes: (1) any separate seam 1 coal analyses from within NMNM 8128; (2) any coal analyses on any of the tracts for which fixed carbon and volatile matter were determined and any complete proximate analyses - if these are needed in light of the contents of exhibits J and M of Thermal's SOR [Statement of Reasons]; (3) what coal reserves are included in each PRLA in each seam to be mined -- reserves should be delineated as NMNM 8128, seam 1, xx tons, etc.;

> (4) whether some of the data was illegally obtained due to lack of approval to commence drilling, and what consequences ensue if it was illegally obtained; (5) the number of acres that will be mined; (6) the average coal thickness by seam; (7) the average overburden thickness; (8) what year is "year one" for this proposed mine; (9) what the recovery factor is * * *; (10) what the inplace coal density for the entire CMV is; (11) whether the state leases are still in effect; (12) the basis for the proposed mine-mouth power plant market for the coal; and (13) the studies mentioned on page 6.36 of the revised Final Showing.

Thermal I, 135 IBLA at 322-323 (footnote omitted).

In Thermal II, we similarly set aside BLM's decision, in which it rejected Thermal's commercial quantities showing, because the BLM decision failed to consider Thermal's data obtained for coal lease application NMNM 11670 after the permit expired. We stated in Thermal II:

> Neither the statute nor the regulation prevents consideration of evidence concerning commercial quantities that was obtained after the permit expired. BLM should disregard the contrary provisions of the BLM Manual (see Atlantic Richfield Co., 121 IBLA 373, 380, 98 I.D. 429, 432-33 (1991); Milton D. Feinberg (On Reconsideration), 40 IBLA 222, 227-28, 86 I.D. 234, 237 (1979)), accept and evaluate the data obtained by the New Mexico Bureau of Mines from its 1985 drilling on NMNM 11670, and allow Thermal "to do test drilling for the limited purpose of obtaining the evidence necessary to prove its alleged discovery of commercial quantities." Hiko Bell, [55 IBLA 324, 331 (1981)].

Thermal II, 135 IBLA at 335 (footnote omitted). We therefore remanded the case file to the State Office for readjudication.

Following remand, BLM issued the July 24, 1997, ROD, here under appeal, which addressed NMNM 8128, 8130, and 11670. In the decision, BLM's commercial quantities determination provided:

> Summary of the Commercial Quantities Determination
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> The BLM has reviewed the revised Final Showing provided by Thermal Energy and all additional information provided concerning the Final Showing.
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> Using the information available, we have determined that Thermal Energy has reasonably estimated the coal quality and quantity of all three PRLA's coal reserves. We have also determined that the proposed mining plan is a reasonable plan to extract the coal reserves in a manner that conforms with Federal and local laws and regulations.

Thermal Energy's estimated operation costs were adjusted for inflation to account for the difference between 1989 costs (costs available when the Final Showing was produced) and 1996 costs (the costs available when the Final showing was evaluated). The adjusted operating costs provided by Thermal energy concerning manpower, equipment, supplies and material do not differ significantly from the costs that the BLM developed during the analysis. Differences occurred based on discrepancies between the tables provided and the maps provided. For example: In some cases, the yearly overburden and production volumes identified in table 4-1 do not correspond with the areas representing those years on production map 4-1. The overburden and production volumes calculated using coal and overburden isopachs and the pit areas represented on the maps did not always match the volumes identified in the tables. Overburden and production volumes directly affect manpower and equipment costs, therefore, every effort was made to resolve these discrepancies. Since the figures identified in the tables were the basis for all of the financial calculations, we based our analyses on the table values and adjusted the map representations as necessary. We have determined that, even though the table volumes and map volumes did not exactly match, the manpower and equipment identified was fully capable of producing the required volumes in the tables. The net effect of the discrepancies was negligible and did not affect our determination that the mining and operation costs provided by Thermal Energy are reasonable.

The BLM prepared a CED [cost estimate document], comparing Thermal Energy's estimated cost of complying with applicable environmental regulations, laws and stipulations with the estimated costs of complying with those same laws, regulations and stipulations as determined by the BLM. The CED was published in the Federal Register on March 5, 1997, dated February 27, 1997, and provided a comment period of 60 days. The BLM received three sets of comments during the comment period. As a result of the comments, the cost of relocating families off the PRLA's was adjusted upwards to $50,000 per family from $30,000. Additionally, the cost of a deep water well has been added to the CED to address the issue of obtaining water. This cost was estimated to be $140,000.

The profitability of the proposed mining operation was evaluated based on the information provided by Thermal Energy and on studies and analysis performed by the BLM. The BLM also considered market and transportation studies concerning the San Juan Basin performed by various consulting firms, including Hill & Associates. In summary, the BLM has determined that Thermal Energy has provided information justifying

> the existence of coal that is of marketable quality and quantity. The company has also provided a mine plan that is reasonable in its layout and basic costs. Thermal Energy did not provide extensive market and transportation costs or information, relying instead on the potential existence of a mine-mouth power plant.
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> Since the 1970's several mine-mouth coal-fired power plants have been proposed in the Four Corners Region. According to the New Mexico Air Quality Board and U.S. Environmental Protection Agency, there are currently two coal-fired plants under consideration in the Four Corners Region. Although neither [of the] proposed power plants [is] on the PRLA lands, the continued interest in building in the Four Corners area and the fact that in the past numerous alternate locations for plats were evaluated and considered, establishes the possibility of a plant being built within the PRLA area.

(Decision at 3-4.)

Finally, under the heading of Decision and Rationale, BLM states:

> The BLM has found that Thermal Energy Company has provided a Final Showing that reasonably depicts the extent, layout and probable costs necessary to develop the PRLA's. And while current market conditions do not indicate that success of the Thermal PRLA's will be a certainty, neither do they indicate that failure of the PRLA's is a certainty. The volatility of the market place and the anticipated need for another power plant in the San Juan Basin at some time in the future make a finding of no Commercial Quantities difficult at this time.
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> The analysis has determined that:
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> a) Thermal has discovered coal in commercial quantities.
>
> b) Thermal has used reasonable economic assumptions and data in support of a finding of commercial quantities of coal;
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> c) Thermal has demonstrated that the conditions and lease stipulations necessary to provide environmental protection can be adequately met.

(Decision at 4.)

In their SOR, Appellants base their appeal of the July 1997 ROD on the argument that the Board directed BLM to accomplish specific tasks on remand and that BLM failed to perform any of them in preparing the July 24, 1997, ROD. Appellants first argue that BLM failed to consider and issue

decisions on the validity of the prospecting permits for the PRLA's issued between 1968 and 1970. (SOR at 17.) Appellants' second contention is that the ROD is not supported by substantial evidence and does not reflect reasoned decisionmaking. Appellants note that the Board identified 13 specific areas or categories of information for NMNM 8128 and 8130 that BLM should request, in addition to "any other information it needs to make a commercial quantities determination." Thermal I, 135 IBLA at 323. Appellants claim that BLM used the same data as in its 1993 rejection of Thermal's applications, while now finding Thermal has discovered coal in commercial quantities. Appellants state:

> In the ROD, BLM disingenuously implies that it based its decision in part on new information. Ex. 1 at 3. However, Appellants' search of the administrative record revealed that no new information bearing on the commercial quantities determination was submitted by Thermal or generated by BLM after the remand -- other than a market study commissioned by BLM whose conclusions are diametrically opposed to BLM's. See Ex. 4.

(SOR at 21, n.13.) Appellants claim that the ROD provides no reasoning to support its reversal on whether commercial quantities exist on PRLA's NMNM 8128 and 8130. (SOR at 21.)

Appellants' third argument for rejecting BLM's decision is that Thermal failed to offer, and BLM failed to evaluate, drill data necessary to the discovery of commercial quantities of coal on PRLA NMNM 11670. (SOR at 22.) Appellants state that Thermal's third PRLA was rejected by BLM in 1992 "for failure to provide adequate geologic information and for failure to discover coal in commercial quantities." Id.; see Ex. 1 to SOR at 2. Appellants claim that, on remand, the administrative record shows no consideration of the 1985 data, as the Board authorized, and the ROD does not mention it. Further, Appellants state, Thermal did not seek permission to conduct or submit the results of any additional test drilling. (SOR at 22.) Appellants assert that the record reflects no interest by Thermal to provide, or BLM to seek and analyze the data "necessary to prove [Thermal's] alleged discovery of commercial quantities." Id., citing Thermal II, 135 IBLA at 335. Without this necessary data, Appellants claim, the finding that Thermal discovered commercial quantities of coal on PRLA NMNM 11670 is without evidentiary support and must be rejected. (SOR at 22, 29-31.)

For reasons set forth below, we set aside and remand BLM's ROD based upon Appellants' arguments concerning the failure of the BLM to adequately address the issue of commercial quantities in the July 24, 1997, ROD; we therefore do not reach questions arising out of the issuance of the three Prospecting Permits.

Between 1968 and 1970, Thermal's predecessors-in-interest were issued Prospecting Permits under section 2(b) of the Mineral Leasing Act of 1920, 30 U.S.C. ' 201(b) (1970). The regulations governing preference right coal

leases appear at 43 C.F.R. Subpart 3430. An applicant for a preference right lease must make an "initial showing" of coal quantity and quality and must indicate the scope and schedule of its operations and mining methods. 43 C.F.R. ' 3430.2-1. After environmental review, the applicant must make a "final showing" of entitlement, including information concerning estimated revenues; proposed means of meeting proposed lease terms; costs of developing a mine, removing, processing, and making coal salable; and estimated costs and revenues if coal is to be mined by a CMV. 43 C.F.R. ' 3430.4-1.

In the previous appeals, BLM rejected the applications on the basis that Thermal had not included in its "final showing" certain data BLM deemed necessary. In Thermal I and Thermal II, supra, the Board set aside BLM's decisions because BLM had rejected the coal lease applications without sufficient information to make that judgment, and remanded the matter back to BLM for a determination whether the lands sought to be leased contain coal in commercial quantities as would justify a "prudent person" in the expenditure of labor and means to establish a successful mine, as required by Departmental regulations at 43 C.F.R. ' 3430.1-2. See Thermal I and II, supra. Now BLM's approval of these same PRLA's comes before us on appeal by the Navajo Nation and Bertha Mescal. Navajo Nation was granted status as Respondent/Intervenor in Thermal's prior appeals and Bertha Mescal is a Navajo Indian residing on the lands subject to the applications.

Our concern with BLM's decision is that it leaves the Board pondering whether there is any valid basis on which BLM reached its conclusions. The decision itself is a near carbon copy of that provided to Ark Land Company granting its applications, and which the Board set aside in The Navajo Nation, 150 IBLA 83 (1999). As in The Navajo Nation, supra, there are no references in the decision to any hard factual data submitted by Thermal. There are no summations of any of the information of record. We are not presented with any detail of what BLM considered in reaching its conclusions, let alone what it considered significant, other than the environmental protection cost estimate document, which is not compared with any of Thermal's submitted costs. BLM's decision, on its face, leaves us with the question, how can BLM make a finding in favor of commercial quantities without providing more supporting data from the record? The ROD simply does not provide us with enough analysis to make a reasoned judgment concerning whether its decision is supported by a rational basis. See Larry Brown & Associates, 133 IBLA 202, 205 (1995).

We are also concerned that there is no evidence in the record that a mine-mouth power plant will be constructed, thus making the commercial quantities determination feasible, even if all other indicia supporting such a determination were present. Thermal has given no indication that it will construct the plant. The study commissioned by BLM suggests that such a plant is not likely to be constructed within the next 15 years. See Ex. 4 to SOR at S-2. This is critical because the record establishes that the PRLA's are not serviced by road or rail permitting coal haulage to other markets.

[1] In Thermal I, 135 IBLA at 322, the Board stated:

> It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. Eddleman Community Property Trust, 106 IBLA 376, 377 (1989); Roger K. Ogden, 77 IBLA 4, 7, 90 I.D. 481, 483 (1983). The recipient of a BLM decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. Larry Brown & Associates, 133 IBLA 202 (1995).

(Emphasis supplied.) See also Vulcan Power Co., 143 IBLA 10, 23 (1998), where the Board set aside and remanded a decision of BLM approving one geothermal unit over another for development in a unit and cooperative agreement, finding that

> the record BLM submitted consists almost entirely of documents filed by the parties when proposing their units and lacks the requisite documentation of BLM's review and decisionmaking process. We have specifically noted the absence of some items, and based upon the file and documents submitted, must conclude that the BLM Decisions are not supported by the record. In such a case, the Decisions are properly set aside and remanded. See Predator Project, 127 IBLA 50, 53 (1993), and cases cited; Shell Offshore, Inc., 113 IBLA 226, 233-34, 97 Interior Dec. 73, 77-78 (1990); Kanawha & Hocking Coal & Coke Co., 112 IBLA 365, 368 (1990).

In Southern Union Exploration Co., 79 IBLA 225, 226 (1984), within the context an appeal involving the awarding of competitive oil and gas leases, the Board stated:

> The Department is entitled to rely on the reasoned analysis of its technical experts in matters concerning geologic evaluation of tracts of land offered at a sale of competitive oil and gas leases. When BLM relies on that analysis in rejecting a bid as inadequate, it must ensure that a reasoned explanation is provided for the record to support the decision. Southern Union Exploration Co., 41 IBLA 81, 83 (1979). * * * The Board has elaborated on the reasons for this as follows:
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> > [T]he appellant is entitled to a reasoned and factual explanation for the rejection of its bid. Appellant must be given some basis for understanding and accepting the rejection or alternatively

> appealing and disputing it before this Board. The explanation provided must be a part of the public record and must be adequate so that this Board can determine its correctness if disputed on appeal. [Citations omitted; emphasis supplied.]

Southern Union Exploration Co., 51 IBLA 89, 92 (1980).

The BLM Manual provides a template for BLM officials performing a final showing analysis. BLM Manual Handbook, H-3430-1, "Processing Coal Preference Right Lease Applications," Chapter VI. Chapter VI.H. sets forth the elements of the commercial quantities test, as follows:

> The commercial quantities test shall consist of:
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> 1. A determination that the applicant has reasonably estimated the quality and quantity of coal for all beds which are cumulatively economic to mine on the PRLA or in the area of the combined mining venture. [Reference omitted.]
>
> 2. A determination that the applicant's proposed method of operation and reclamation is in conformity with all applicable laws, regulations, and lease conditions and stipulations.
>
> 3. A determination that all applicable costs and revenues have been considered and have been calculated in a reasonable manner.
>
> 4. A determination that the conditions or protective lease stipulations assure that environmental damage can be avoided or acceptably mitigated (43 CFR 3430.5-3(c)).
>
> 5. A determination that, when all of the above have been verified, the applicant has a reasonable prospect of producing coal at a royalty rate of 12 2 percent for surface mines and 8 percent for underground mines at a profit.
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> The determination of a reasonable expectation of profitability must be based on a complete analysis and evaluation of the information submitted in the final showing.

(BLM Manual, H-3430-1, Rel. 3-173, 8/8/87, Chapter VI.H., at VI-5 (emphasis supplied).) The provisions of the BLM Manual do not have the force and effect of law; nevertheless, as this Board has held on numerous occasions, they are binding on BLM. Arizona Silica Sand Co., 148 IBLA 236, 243 (1999); Howard B. Keck, Jr., 124 IBLA 44, 55 (1992), and cases cited therein.

The Board will normally not substitute its own judgment for that of Departmental experts, but sufficient facts and a sufficiently comprehensible explanation must be present before the Board will affirm a decision and supporting rationale. David V. Udy, 81 IBLA 58, 62 (1984); Roger K. Odgen, supra at 8, 90 I.D. at 484; M. Robert Paglee, 68 IBLA 231, 234 (1982). In this case, as in The Navajo Nation, supra, the decision and case record disclose only the conclusions of BLM that applicant's proposed method of operation and reclamation is in conformity with all applicable laws and regulations, that all applicable costs and revenues have been considered and have been calculated in a reasonable manner, that the applicant has reasonably estimated the quality and quantity of coal for all beds which are cumulatively economic to mine on the PRLA's, that the conditions or protective lease stipulations assure that environmental damage can be avoided or acceptably mitigated, and that the applicant has a reasonable prospect of producing coal, while paying the required royalty rate, at a profit. It is clear, however, that both Thermal and BLM have provided no evidence in the record, and certainly none in the decision appealed from, that coal, in commercial quantities, can be produced at a profit from these three PRLA's. BLM has failed to satisfactorily address Appellant's claim that there is no basis to believe a mine-mouth power plant will be constructed, and BLM's own study refutes the feasibility of such a scheme. Because there is no sustainable basis for BLM's conclusion on the record before us, we are obligated to set aside BLM's decision and remand the matter to BLM to address squarely in its decision the basis on which it has determined Thermal can produce coal in commercial quantities from the PRLA's.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. ' 4.1, the decision appealed is set aside and remanded to the New Mexico State Office for further adjudication consistent with this opinion.

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James P. Terry
Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge